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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ALEX JAVAHERI, Plaintiff and Appellant, v. AUM, L.P., et al., Defendants and Respondents.	B206898 (Los Angeles County Super. Ct. No. SC083422)

APPEAL from a judgment of the Superior Court of Los Angeles County. Cesar Sarmiento, Judge. Affirmed.

Law Offices of Tabone, Derek K. Tabone for Plaintiff and Appellant.

Bremer, Whyte, Brown & O'Meara, John V. O'Meara, Patrick Au; Everett L. Skillman for Defendants and Respondents.

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Alexander Javaheri appeals from the judgment entered in favor of respondents AUM, L.P., Xurolif, and Fargo, Inc., on his complaint against them. We affirm.

Background

Plaintiff owns an apartment building on Durango Street in Los Angeles. When he bought the building, in 1998, there was a single family home in the lot directly south of his. In 2002, defendant AUM bought that lot, planning to build a multi-unit condominium with underground parking, to be called Durango Manor. (Defendant Xurolif is AUM's general partner.) AUM hired defendant Fargo, a contractor, and in January 2003, demolished the house and began excavation.

In November 2004, plaintiff brought this lawsuit for negligence, trespass, strict liability for failure to comply with Civil Code section 832,[1] and intentional or negligent infliction of emotional distress,[2] contending, inter alia, that his building was damaged by the excavation.

The case was tried to a jury. Plaintiff called Xurolif general partner Suresh Gupta, Brian Kent of Fargo, and a representative of one of the subcontractors, and questioned them about the planning, design, permit, and construction process for Durango Manor, focusing on grading, excavation, drainage, compaction of soil, decisions about shoring, reports by the soils engineer, and the effect of January 2003 rain. He then called several

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[1] That statute provides, inter alia, that "1. Any owner of land or his lessee intending to make or to permit an excavation shall give reasonable notice to the owner or owners of adjoining lands and of buildings or other structures, stating the depth to which such excavation is intended to be made, and when the excavating will begin." The trial court ruled that failure to comply with the statute can be a basis for a claim of strict liability. However, plaintiff agreed that neither Fargo nor Xurolif could be liable on this cause of action, and the cause of action went to the jury on AUM only.

[2] The court granted defendants' motion for summary adjudication of a cause of action for nuisance.

expert witnesses who testified that his building had evidenced cracking on the south side, and suffered differential settlement and other damage, and that the excavation was the cause. Plaintiff also presented evidence that the cost of repair was $654,000.

Plaintiff himself testified that he never received the notice of excavation required under Civil Code section 832. He also presented evidence that defendants trespassed by pumping water onto his property, removing his razor wire, and storing debris, a sign, and a portable toilet on his property.

The defense called, inter alia, its own experts, who controverted plaintiff's experts and who testified that the excavation could not have, and did not, harm plaintiff's building, and that any damage to that building had other causes, which they specified. Defendants also called a Durango Manor resident who testified that in mid-August 2006, he saw plaintiff taking a hammer and chisel to the south side of his building, enlarging cracks in the stucco.

The jury had before it numerous exhibits, including photographs, soil reports, City approvals for the project, and expert reports.

On special verdicts, the jury found that each of the defendants was not negligent, that no defendant had entered plaintiff's property, and that AUM gave plaintiff reasonable notice under Civil Code section 832. The court entered judgment in defendants' favor. Plaintiff's motion for new trial/judgment notwithstanding the verdict was denied, and he was ordered to pay defendants' costs.

Discussion

1. Substantial evidence

Trespass

Plaintiff challenges the substantial evidence for the jury finding, contending that the evidence of trespass is irrefutable and was not refuted. He has not provided us with a complete statement of facts (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888), but even a cursory glance at the record reveals that plaintiff's evidence was refuted.

Representatives of AUM and Fargo testified that no water had been pumped onto plaintiff's property, that no employee went into plaintiff's property to remove razor wire, and that the debris and toilet were on City property.

Strict liability for failure to give notice under Civil Code section 832

Plaintiff's argument here is based on his testimony that he did not receive this notice, and the evidence that defendants did not have a copy of the notice sent to plaintiff and that no representative of defendants could specifically recall signing that notice. The evidence nonetheless supports the jury's finding. Defendants presented evidence that the City required notices as a condition of one of the required permits, that in the ordinary course of business notices were sent out to all adjoining landowners, and that the permit was granted. That is sufficient.

2. Exclusion of evidence

Here, plaintiff has two contentions, that the court erred in excluding evidence concerning problems with portions of the excavation which were not adjacent to his property, and that the court erred in excluding evidence through which he sought to prove that defendants were in violation of OSHA regulations during the excavation. Plaintiff's theory was that this evidence would show that defendants were rushed and short of cash and thus cut corners, and was relevant to prove that defendants violated the standard of care by not shoring the excavation, and that defendants cut corners by failing to send him the required notice.

The trial court excluded all this evidence on relevance grounds, and under Evidence Code section 352. We see no abuse of discretion in either ruling. Plaintiff was given every opportunity to convince the jury that defendants' actions damaged his building. The jury was not persuaded. Evidence that defendants' conduct was subpar in other respects, which did not affect his building, could not, and should not, have made a difference.

3. Jury Instructions and the Special Verdict

Plaintiff complains of two of the trespass instructions, arguing that one was erroneous, and one was unnecessary. He also complains that, relative to trespass, the court failed to instruct the jury that a corporation acts through its officers and employees.[3]

"A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 580.)

Plaintiff does not contend that the unnecessary instruction led to prejudice, and we need not consider the contention further. Next, we agree with the defendants that the jury was adequately instructed on agency, with the instruction that "an entity is responsible for harm caused by the wrongful conduct of its agents while acting within the scope of their agency."

As to the allegedly erroneous instruction, plaintiff contends that the instruction did not conform to the evidence and did not instruct the jury that nominal damages could be awarded. He sets out the instruction which he contends should have been given. It differs from the instruction actually given in two respects.

First, the jury was instructed that plaintiff had the burden of proving that defendants "intentionally, recklessly, or negligently entered [plaintiff's] property." Plaintiff contends that the instruction should have additionally told the jury that trespass could be proved with evidence that defendants "intentionally, recklessly, or negligently caused other persons or objects such as construction materials, a sign, water or construction equipment to enter [plaintiff's] property."

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[3] Plaintiff also writes that the court erred by failing to instruct the jury that damages for trespass could include non-economic damages, but acknowledges that, since the jury did not find trespass, the failure to give such an instruction could not be reversible error.

Next, the jury was instructed that plaintiff had the burden of proving that he was "actually harmed." Plaintiff now suggests that the jury should have been instructed only that he had to prove that he was harmed.

We see no reversible error. The jury instruction on agency would have told the jury that trespass could be accomplished by the defendants' agents. And, we cannot see how, or why, a jury would have distinguished between "harm" and "actual harm," or how the difference in the wording could have prejudiced plaintiff. Plaintiff argues that he "may seek" nominal damages, but cites to nothing in the record which would show that he did seek such damages. He has thus not established that he was entitled to an instruction on the point. (*Soule v. General Motors Corp.*, *supra,* 8 Cal.4th at p. 572.)

Plaintiff also complains that the special verdict form did not conform to the causes of action actually tried, and contends that the form should have had a different organization, with a different order of questions. In the trial court, plaintiff did not make the objections he now asserts, or seek the form he now contends was the correct one. The contention is waived. (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1093, fn. 6.)

4. The JNOV

Plaintiff contends that it was error for the trial court to deny his motion. The contention is based on the arguments we have just discussed. Because we find substantial evidence for the verdict, no error in the exclusion of evidence, etc., we also find no error in the court's ruling on this motion.

5. Costs

After the jury returned its verdict, defendants sought costs in the amount of $163,760. The costs bill included a sum for expert witness fees, and defendants attached a copy of their statutory offer to compromise under Code of Civil Procedure section 998, in the amount of $1001. The court found that the section 998 offer was in good faith and awarded the costs requested.

Plaintiff contends that the court erred in that finding. He argues that the amount of the offer was so much smaller than the damages he claimed, and was made so early in the litigation, before expert depositions were taken, that it was not in good faith.

Our review is for abuse of discretion, and we find none. "'[W]hether a section 998 offer was reasonable and made in good faith is a matter left to the sound discretion of the trial court.' [Citation.] 'However, when a party obtains a judgment more favorable than its pretrial offer, it is presumed to have been reasonable and the opposing party bears the burden of showing otherwise.' [Citation.] An appellate court reviewing a section 998 offer may not substitute its opinion for that of the trial court unless there has been a clear abuse of discretion, resulting in a miscarriage of justice. [Citation.]" (*Arno v. Helinet Corp*. (2005) 130 Cal.App.4th 1019, 1025.)

In making its finding, the trial court noted that it was very familiar with the case, having been involved in a settlement conference, and understood each side's position, and that "given the context of this case and the facts of the case" the offer was made in good faith.

We are of course less familiar with the case, but as far as we can tell, defendants' offer would have been made based on its evaluation of the case (shared by the jury) that plaintiff had no damages whatsoever, so that a calculation based on claimed damages would not be appropriate. Moreover, this evaluation would have been based not on information known only to defendants (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 698-700) but on defendants' evaluation that plaintiff was making a claim for which he had no basis.

Plaintiff also objects to a number of the specific items of costs, contending, for instance, that the costs claimed for models, blow-ups and photocopies of exhibits had to have included non-recoverable amounts, and making a similar argument about messenger fees. Appellant has not, however, provided us with a copy of his motion to tax costs. We thus cannot say that appellant timely raised these contentions, or that the trial court

abused its discretion in allowing these costs. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.)

Disposition

The judgment is affirmed. Respondents to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.